WISCONSIN SUPREME COURT
CALENDAR AND CASE SYNOPSES
MARCH 2014

The cases listed below will be heard in the Wisconsin Supreme Court Hearing Room, 231 East, State Capitol. This calendar includes cases that originated in the following counties:

Barron
Eau Claire
Jefferson
Kenosha
Milwaukee
Polk
Portage
Racine
Winnebago
Wood

THURSDAY, MARCH 13, 2014

9:45 a.m.	12AP1047	-	Asma Masri v. Wisconsin Labor and Industry Review
10:45 a.m.	12AP2170	-	State v. Joseph J. Spaeth
1:30 p.m.	12AP1644	-	Rachelle R. Jackson v. Wisconsin County Mut. Insurance Corp.

FRIDAY, MARCH 14, 2014

9:45 a.m.	12AP597	-	Scott Partenfelder v. Steve Rohde
10:45 a.m.	12AP2499	-	Eileen W. Legue v. City of Racine
1:30 p.m.	{12AP1769-CR	-	State v. Martin P. O'Brien
	{12AP1770-CR	-	State v. Kathleen M. O'Brien
	{12AP1863-CR	-	State v. Charles E. Butts

TUESDAY, MARCH 18, 2014

9:45 a.m.	12AP2557-CR	-	State v. William F. Bokenyi
10:45 a.m.	12AP1967	-	Data Key Partners v. Permira Advisors LLC
1:30 p.m.	12AP2140-CR	-	State v. Angelica C. Nelson

WEDNESDAY, MARCH 19, 2014

9:45 a.m.	12AP2185-CR	-	State v. James R. Hunt
10:45 a.m.	13AP221	-	Dow Family, LLC v. PHH Mortgage Corporation
1:30 p.m.	{11AP1653-CR	-	State v. Carlos A. Cummings
	{12AP520-CR	-	State v. Adrean L. Smith

In addition to the cases listed above, the following cases are assigned for decision by the court on the last date of oral argument based upon the submission of briefs without oral argument:

11AP584-D - Office of Lawyer Regulation v. Michael D. Mandelman
12AP931-D - Office of Lawyer Regulation v. Richard W. Voss
12AP2423-D - Office of Lawyer Regulation v. Bridget E. Boyle

The Supreme Court calendar may change between the time you receive these synopses and when the cases are heard. It is suggested that you confirm the time and date of any case you are interested in by calling the Clerk of the Supreme Court at 608-266-1880. That office will also have the names of the attorneys who will be arguing the cases.

Media interested in providing camera coverage, must make requests 72 hours in advance by calling media coordinator Rick Blum at (608) 271-4321. Summaries provided are not complete analyses of the issues presented.

WISCONSIN SUPREME COURT
THURSDAY, MARCH 13, 2014
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which affirmed a Milwaukee County Circuit Court decision, Judge William S. Pocan, presiding.

2012AP1047 Masri v. LIRC and Medical College of Wisconsin

This case examines whether an unpaid health-care intern is considered an employee protected by Wisconsin's health care worker protection statute, Wis. Stat. § 147.997.

Some background: Asma Masri, who was an intern at the Medical College of Wisconsin, seeks review of a Court of Appeals' decision affirming a circuit court order which, in turn, affirmed a Labor and Industry Review Commission (LIRC) determination that she was not an employee protected by the statute.

In August of 2008, Masri was a doctoral candidate at the UW-Milwaukee. She began an unpaid internship with the Medical College of Wisconsin and was assigned to the transplant surgery unit at Froedtert Hospital. She worked 40 hours a week and was provided with office space, support staff, free parking, full access to facilities and patient records, and professional networking opportunities. Although her supervisor promised to provide her with health insurance and the ability to pursue grants, she did not receive either before she was terminated.

In November of 2008, Masri met with a Medical College of Wisconsin official to report alleged medical ethics violations that she said she had observed during her internship. Her internship was terminated soon thereafter. Masri filed a retaliation complaint with the Equal Rights Division (ERD) of the Wisconsin Department of Workforce Development. An ERD officer issued a preliminary determination and order dismissing Masri's complaint on the grounds that the ERD lacked jurisdiction because Masri was not an employee protected by § 146.997. An administrative law judge (ALJ) affirmed in January 2010. LIRC affirmed in August 2011. The circuit court affirmed LIRC's decision in April 2012.

Masri appealed, and a divided Court of Appeals affirmed. Masri argued that because the statute uses the word "person," this means the legislature intended the statute to protect both employees and non-employees from retaliation. In the alternative, she argued that if the statute only covers employees, she was in fact an employee of the time she reported her ethical concerns. The Court of Appeals disagreed with both propositions.

The Court of Appeals pointed out that under the due weight deference standard applied, it must uphold LIRC's decision unless that decision is contrary to the clear meaning of the statute and no more reasonable interpretation exists. See Milwaukee Symphony Orchestra, Inc. v. Wisconsin DOR, 2010 WI 33, ¶36, 324 Wis. 2d 68, 781 N.W.2d 674.

The Court of Appeals went on to conclude that LIRC's decision that § 146.997 applies only to employees was consistent with the statute's clear language and was reasonable.

The Court of Appeals said Masri correctly pointed out that the legislature did use the word "person" several times in § 146.997(3), which restricts disciplinary action against a person who reports possible violations in good faith.

However, the court said Masri ignored the fact that the other subsections of the statute, which are interrelated with sub. (3) are specifically limited to employees. The Court of Appeals

went on to note that § 146.997(1)(b) defines the disciplinary action prohibited by § 146.997(3) as limited to "action taken with respect to an employee."

Court of Appeals Judge Ralph Adam Fine wrote a strong dissent, saying the case affected an important policy: the suppression of information embarrassing to health care facilities and providers. He said the predominant purpose of § 146.997 is not to advance the personal interests of healthcare whistleblowers but to protect the people of Wisconsin. Fine argued that Masri did receive significant intangible benefits as a result of her work for the Medical College.

WISCONSIN SUPREME COURT
THURSDAY, MARCH 13, 2014
10:45 a.m.

This is a certification from the Wisconsin Court of Appeals, District II (headquartered in Waukesha). The Court of Appeals may certify cases that it believes cannot be resolved by applying current Wisconsin law. The Wisconsin Supreme Court, as the state's preeminent law-developing court, often accepts such certifications from the Court of Appeals. This case originated in Winnebago County Circuit Court, Judge Thomas J. Gritton, presiding.

2012AP2170 State v. Spaeth

The central question in this certification is whether a Wis. ch. 980 petition to commit a sexually violent offender may specify a predicate offense that is not the same offense for which the person is in custody.

Wis. § 980.02(1m) and (2) require that a petition for the commitment of a sexually violent offender be filed "before the person is released or discharged" and must allege that a person has been convicted of a sexually violent offense.

The Court of Appeals poses the question: "Does § 980.02 additionally require that the commitment petition be filed before the person is released or discharged from a sentence that was imposed for the same sexually violent offense that is alleged in the petition as the predicate offense, as stated in State v. Gilbert, 2012 WI 72, ¶51, 342 Wis. 2d 82, 816 N.W.2d 215?"

Some background: In 1993, in case No. 1992CF328 (the 1992 case), Josehp J. Spaeth was convicted of first-degree sexual assault of a child. In 2004, Spaeth was paroled. While on parole, Spaeth reoffended, and his parole was revoked. Spaeth was discharged from this 1993 conviction in June 2008.

In 2007, in case No. 2006CF350 (the 2006 case), Spaeth was convicted of child enticement, based on his conduct while out on parole on the 1992 case.

In October 2008, the circuit court vacated Spaeth's conviction and ordered a new trial due to prejudicial and extraneous information in the jury room.

In early 2009, Spaeth pled no contest to amended charges for child enticement and was convicted and sentenced. The 2009 conviction was reversed by the Supreme Court on July 13, 2012, State v. Spaeth, 2012 WI 95, ¶3, 343 Wis. 2d 220, 819 N.W.2d 769, and Spaeth's conviction was vacated on Aug. 20, 2012, and the child enticement charges were dismissed on August 21, 2012.

In the meantime, on Nov. 2, 2010, the state filed a petition for Spaeth's ch. 980 commitment as a sexually violent person. The petition cited the 2006 case as the predicate offense. *See* Gilbert, 342 Wis. 2d 82, ¶4 n.4 (using phrase "predicate offense" to refer to the sexually violent offense specified in the petition).

While the petition was pending, the Supreme Court overturned his conviction. By letter dated Aug. 15, 2012, the state informed the circuit court that it intended to continue with the petition, relying on the 1992 case instead of the 2006 case. Spaeth responded that the petition expressly relied upon only the 2006 case. Further, argued Spaeth, even if amended to rely on the 1992 case, the petition was untimely because Spaeth had been discharged from that case in 2008, well before the petition was filed on Nov. 2, 2010.

The circuit court agreed with Spaeth, ruling that neither the 2006 case nor the 1992 case could form the predicate offense for the petition because Spaeth had been discharged from one conviction (from the 1992 case) and the other convictions had been overturned and vacated, and the enticement charges dismissed (from the 2006 case). The circuit court denied the state's motion to amend, and dismissed the petition.

The state appealed, arguing that the circuit court erred in denying amendment of the petition to specify the 1992 case as the predicate offense.

The Court of Appeals says the dispute is whether the circuit court erred in denying the State's proposed amendment of the petition to specify the intact, though discharged, 1992 case as the predicate offense.

A decision by the Supreme Court could determine whether a ch. 980 petition may specify a predicate offense that is not the same offense for which the person is in custody, and in this case, if it was error for the circuit court to assess the viability of the petition at the time of the requested amendment.

WISCONSIN SUPREME COURT
THURSDAY, MARCH 13, 2014
1:30 p.m.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which reversed a Milwaukee County Circuit Court decision, Judge William Sosnay, presiding.

2012AP1644 Jackson v. Wis. Co. Mut. Ins. Corp.

This dispute over underinsured motorist coverage arises from an incident in which a Milwaukee County Sheriff's deputy was struck by a car while working at General Mitchell Airport in Milwaukee. The Supreme Court examines the meaning of the word "use" under the policy and whether the deputy was "using" the car that struck her.

Some background: On June 8, 2010, deputy Rachelle Jackson was patrolling the sidewalk on "the pickup side" of the terminal. A car stopped and the driver, Daniel Lynch, indicated he needed directions to a hotel because he had become lost. Jackson motioned the car to pull to the curb so it would be out of traffic. She then spoke to the occupants of the car through the passenger-side window and gave them directions to the hotel.

After completing the directions, the driver asked Jackson how he would be able to get back into traffic. Jackson responded that she would go in front of his car and then around to the driver's side and help him get into traffic. As Jackson walked in the pedestrian walkway in front of the car, the driver apparently inadvertently accelerated, and the car struck her.

At the time of the incident, Milwaukee County had a "Public Entity Liability Insurance" policy (the policy) with Wisconsin County Mutual Insurance Corp. (WCMIC). Jackson was an additional insured under that policy because she was an employee of the county acting within the scope of her employment or authority.

The policy provided underinsured motorist coverage to "an insured . . . while using an automobile within the scope of his or her employment or authority." The policy further states that "*[u]sing* has the meaning set forth in Wis. Stat. Sec. 632.32(2)(c) and includes driving, operating, manipulating, riding in and any other use."

Jackson sued WCMIC and the driver in circuit court.

WCMIC moved for summary judgment on the ground that Jackson was not "using" an automobile at the time of the accident, and therefore that the underinsured motorist coverage did not apply.

The circuit court granted summary judgment to WCMIC, concluding that Jackson had not been "using" the underinsured driver's car when she had been struck and injured.

Jackson appealed, and the Court of Appeals reversed. It concluded that Jackson's helping the underinsured vehicle to safely re-enter traffic constituted "manipulating" that vehicle or "any other use" of the underinsured vehicle.

The Court of Appeals pointed to two of its own prior decisions as support for interpreting "use" to cover the present fact situation. In Garcia v. Regent Ins. Co., 167 Wis. 2d 287, 481 N.W.2d 660 (Ct. App. 1992), the Court of Appeals concluded that sitting in a car while calling and gesturing to a child that it was safe to cross a street constituted "use" of the vehicle within the meaning of the insurance policy. In Trampf v. Prudential Prop. & Cas. Co., 199 Wis. 2d 380, 544 N.W.2d 596 (Ct. App. 1996), the Court of Appeals concluded that a vehicle had been "used"

for insurance purposes when dogs tied to the roll bar of the vehicle had bitten a passing pedestrian, even though the vehicle's owner was not in or near the vehicle at the time of the bite.

The Court of Appeals concluded that Jackson was "using" the Lynch vehicle at the time of her injury "because her injuries directly 'flowed from' and 'grew out of' her helping the driver safely re-enter traffic—a responsibility that was obviously within the scope of her employment."

WCMIC contends the Court of Appeals stretches the definition of "use" of a vehicle too far in that it was not Jackson's vehicle or her employer's vehicle, she was not touching the vehicle, and a third party was, in fact, operating the vehicle at the time it struck Jackson.

The Supreme Court is expected to provide guidance on what constitutes "using" a vehicle for insurance coverage purposes.

WISCONSIN SUPREME COURT
FRIDAY, MARCH 14, 2014
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which reversed a Milwaukee County Circuit Court decision, Judge Timoth M. Witkowiak, presiding.

2012AP597 Partenfelder v. Rohde

This case arises from the collision of a freight train and mini-van that occurred as people gathered for a Memorial Day parade in the village Elm Grove in 2009. The Supreme Court examines whether the Federal Railroad Safety Act ("FRSA") preempts the plaintiffs' state-law negligence and safe-place claims.

Some background: Each year, the village of Elm Grove hosts a Memorial Day parade that draws traffic into the area of several rail crossings in the village. On May 6, 2009, the village police department sent advance written notification to the Soo Line Railroad, asking that Soo Line "make every attempt to notify your train conductors of the potential for pedestrian and vehicle hazards on the tracks." The police department sent a follow-up letter, and made a phone call after not getting a response to the letters.

As predicted, traffic became congested when Scott Partenfelder and his wife, Monica Ensley Partenfelder, were traveling in separate vehicles to the parade. The couple's two-year-old son was a passenger in Monica's minivan, which got stuck on the tracks with cars behind and ahead of her as the train crossing gates came down and alarms sounded.

Scott Partenfelder and Police Officer John Krahn rushed to the minivan, got Monica out, and were working to remove the boy from his car seat when the train collided with the minivan. The boy remained strapped in his car seat and was uninjured, but Partenfelder and Krahn were seriously injured.

An investigation of the accident verified that Soo Line fully complied with the applicable rules, time tables, and orders. Scott was ticketed for driving without a valid driver's license, and Monica was cited for failing to stop clear of the tracks. She admitted to violating the law in this regard. The crew hit the emergency brakes 348.48 feet before hitting the Partenfelders' van, and the train was travelling approximately 44.8 miles per hour at the moment of impact. The speed limit at the crossing for the train was 50 miles per hour.

Krahn brought a negligence claim and Partenfelder brought a negligence claim and a safe-place claim against Soo Line Railroad Co. and Steve Rohde, a Soo Line employee who was later dismissed from the case.

Soo Line and Rohde moved for summary judgment. They argued, among other things, that the negligence and safe-place claims were preempted by the FRSA. The FRSA has a preemption clause, which reads:

(a) National uniformity of regulation.--(1) Laws, regulations, and orders related to railroad safety . . . shall be nationally uniform to the extent practicable.

(2) A State may adopt or continue in force a law, regulation, or order related to railroad safety . . . until the Secretary of Transportation . . . prescribes a regulation or issues an order covering the subject matter of the State requirement. . . . (49 U.S.C. § 20106).

The trial court granted partial summary judgment to Soo Line and Rohde, concluding that the FRSA preempted the plaintiffs' negligence and safe-place claims to the extent those claims were based on allegations that Soo Line and Rohde had a duty to slow or stop the train because of the Memorial Day parade.

A divided Court of Appeals reversed the trial court's summary judgment order on the preemption issue. The majority ruled in part that the Memorial Day parade constituted a specific, individual hazard as defined under Anderson v. Wisconsin Cent. Transp. Co., 327 F. Supp. 2d 969, 977 (E.D. Wis. 2004), and therefore claims based upon the parade were excepted from federal preemption under the FSRA.

Soo Line objects that the Court of Appeals has interpreted the "specific, individual hazard" exception in Anderson to the FRSA preemption far too broadly. It argues that the opinion empowers local government to control train speeds whenever traffic might be near railroad tracks, so that railroads would have to deviate from the operational practices dictated by federal law for even relatively mundane traffic-producing events.

A decision by the Supreme Court could potentially have wide ranging effects on railroad traffic on 3,000 miles of track in Wisconsin and possible elsewhere on interconnected rails.

WISCONSIN SUPREME COURT
FRIDAY, MARCH 14, 2014
10:45 a.m.

This is a certification from the Wisconsin Court of Appeals, District II (headquartered in Waukesha). The Court of Appeals may certify cases that it believes cannot be resolved by applying current Wisconsin law. The Wisconsin Supreme Court, as the state's preeminent law-developing court, often accepts such certifications from the Court of Appeals. This case originated in Racine County Circuit Court, Judge Charles H. Constantine, presiding.

2012AP2499 Legue v. City of Racine

This certification from the District II Court of Appeals arises from a traffic accident in which an officer driving a police squad collided with another vehicle at an intersection in Racine.

The Supreme Court examines whether governmental immunity applies when someone is injured because an officer proceeds against a traffic signal as authorized by Wis. Stat. § 346.03(2)(b), if the officer slowed the vehicle and activated lights and sirens as required by § 346.03(3) but nonetheless arguably violated the duty to operate the vehicle "with due regard under the circumstances" as required by § 346.03(5)?

The Court of Appeals says the ramifications of this case are significant because if immunity for the manner of entering the intersection is held to be subject to the "due regard" condition, then immunity will become "just an empty shell if an accident results."

Some background: In July of 2009, Officer Amy Matsen received a dispatch calling her to the scene of a motor vehicle accident. Matsen headed north on Douglas Avenue in Racine at a high rate of speed with lights and sirens engaged, periodically sounding her horn. As she neared the intersection with South Street, she saw the light was red and she slowed down. A restaurant at the southwest corner of the intersection blocked the view between the western portion of South Street and the southern portion of Douglas Avenue. Matsen reduced her speed to 27 miles an hour, below the posted speed limit of 35, and proceeded through the intersection.

Eileen Legue, the plaintiff in this case, was traveling east on South Street at 30 miles an hour and was just about to enter the intersection with Douglas Avenue. Legue had her windows up and music playing and did not hear Matsen's sirens or horn. The front end of Legue's vehicle struck the driver's side of Matsen's vehicle. Both women were injured in the collision.

Legue filed suit, seeking compensation for damages she sustained as a result of Matsen's alleged negligence. Matsen's answer included the defense of governmental immunity and the public officer's privilege to violate traffic laws in an emergency. A jury trial was held on the issues of whether, upon entering the intersection, Matsen drove with due regard under the circumstances for the safety of all persons; if not, whether Matsen's negligence was a cause of the accident; and whether Legue was contributorily negligent. The jury found both parties negligent and found that each was equally at fault.

Matsen filed motions after verdict on the grounds that, as a matter of law, the evidence established she could not have prevented the accident except by deciding not to enter the intersection, a decision for which she claimed she was immune from liability. Legue's response was that although Matsen's decision to enter the intersection was discretionary, the duty to operate her vehicle with due regard under the circumstances for the safety of all persons was ministerial.

Legue argued that because the restaurant blocked the view, Matsen had a ministerial duty to greatly reduce her speed, or even stop, before entering the intersection. The circuit court granted Matsen's motions, finding that Matsen was immune from liability for damages resulting from her discretionary decision to enter the intersection.

Legue appealed, leading to this certification.

District II notes governing case law interprets the statute to mean that public employees are generally immune for damages caused by their acts in the scope of their employment, subject to four exceptions: performance of ministerial duties, known dangers giving rise to ministerial duties, exercise of medical discretion, and intentional, willful, and malicious actions. See Brown v. Acuity, 2013 WI 60, ¶42, 348 Wis. 2d 603, 833 N.W.2d 96.

The parties to this case agree that Matsen's decision to enter the intersection was discretionary and that liability cannot be premised on that decision by itself. It says the pertinent question presented here was left open by Brown: Whether an officer who fulfills the ministerial duties of § 346.03(2)(b) and (3) but arguably violates the duty to operate the vehicle with due regard under the circumstances is entitled to immunity.

A decision by the Supreme Court could clarify the extent of governmental immunity available to officers involved in accidents while responding to an emergency.

WISCONSIN SUPREME COURT
FRIDAY, MARCH 14, 2014
1:30 p.m.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha). The Court of Appeals affirmed decisions from Walworth County Circuit Court, Judge James L. Carlson and Judge John R. Race, presiding; and Kenosha County Circuit Court, Judge Anthony G. Milisauskas, presiding.

2012AP1769-70-CR State v. O'Brien
2012AP1863-CR State v. Butts

This consolidated case presents constitutional challenges to the recently enacted Wis. Stat. § 970.038, which allows hearsay evidence to be introduced and relied upon for a finding of probable cause at a preliminary hearing.

Some background: Under Wisconsin law, the defendant is entitled to an "initial appearance" upon arrest, Wis. Stat. § 970.01, followed soon after by a "preliminary examination." Sec. 970.03(2). This preliminary examination is a creature of statute and is not mandated by federal or state constitutions. State v. Camara, 28 Wis. 2d 365, 370, 137 N.W.2d 1 (1965). Its sole purpose is to "determin[e] if there is probable cause to believe a felony has been committed by the defendant." Sec. 970.03(1).

Before the enactment of § 907.038 in 2011, hearsay was inadmissible at preliminary examinations in Wisconsin criminal proceedings, unless the hearsay fell within one of the statutory exceptions by which hearsay is admissible. See Wis. Stat. §§ 908.07 and 970.03(11) (2009-10) (repealed by 2011 Wis. Act 285); see also Mitchell v. State, 84 Wis. 2d 325, 333, 267 N.W.2d 349 (1978). In 2011, the legislature enacted 2011 Wis. Act 285, which repealed §§ 908.07 and 970.03(11) (2009-10), and created § 970.038, which states:

> **970.038 Preliminary examination; hearsay exception.**
> **(1)** Notwithstanding s. 908.02, hearsay is admissible in a preliminary examination under ss. 970.03, 970.032, and 970.035.
> **(2)** A court may base its finding of probable cause under s. 970.03 (7) or (8), 970.032 (2), or 970.035 in whole or in part on hearsay admitted under sub. (1).

In this consolidated case arising out of interlocutory appeals, the Court of Appeals held that § 970.038 does not violate a defendant's right to confrontation, due process, compulsory process, or effective assistance of counsel.

2012AP1769-70-CR

In May 2012, the state charged Martin and Kathleen O'Brien with multiple counts of felony child abuse. The O'Briens were released on signature bonds shortly thereafter. Before the preliminary examination, Martin O'Brien filed a motion seeking to preclude the state from using hearsay evidence at the preliminary examination, and the state filed a motion to quash Kathleen O'Brien's subpoena of one of the victims and to require an offer of proof as to what relevant testimony the victim could provide to defeat probable cause.

At the preliminary examination, the trial court denied Martin O'Brien's motion to preclude hearsay evidence. The court granted the state's motion to quash Kathleen O'Brien's subpoena and to preclude the O'Briens from calling the victim as a witness at the preliminary examination.

In the evidentiary portion of the preliminary examination, the State's sole witness was a police investigator who conducted some, but not all, of the initial interviews with the alleged victims and the follow-up investigation. The court found the investigator's testimony established probable cause and bound both of the defendants over for trial.

The O'Briens argue that § 970.038 violated their rights to confrontation, due process, compulsory process, and assistance of counsel.

2012AP1863-CR

In April 2012, the state charged Charles E. Butts with child sexual assault and child enticement as a persistent repeater. In the complaint, probable cause for the charges is based upon statements made by two minors reporting that Butts sexually assaulted them.

At Butts' preliminary examination, the state's sole witness was a police detective who testified that during her investigation, one minor female identified Butts in a photo lineup as the man who sexually assaulted her. The detective further testified that she was aware of a statement made by a different minor female, and recorded in a police report prepared by a different investigator, that Butts sexually assaulted that girl as well. The detective admitted in testimony that she was not present when the second girl's statement was taken and was not certain which detective took that statement. The trial court overruled Butts' hearsay objection and held that the hearsay evidence established probable cause to bind over Butts for trial.

Butts argues that § 970.038 violated his rights to confrontation, cross-examination, compulsory process, and due process.

In an amicus brief, the State Public Defender argues that § 970.038 violates due process because by its operation, preliminary examinations may no longer provide for meaningful review of the charging decision or meaningful review of whether sufficient evidence exists for a bindover.

The state responds by noting, among other things, that preliminary examinations are not mandated by federal or state constitutions; thus, the State claims, it is the legislature's prerogative to make the changes it deems appropriate to the type of evidence that may be admitted at the preliminary hearing and used as the basis for a bind-over decision.

A decision by the Supreme Court could determine the constitutionality of § 970.038.

WISCONSIN SUPREME COURT
TUESDAY, MARCH 18, 2014
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which reversed a Polk County Circuit Court decision, Judge Molly E. GaleWyrick, presiding.

2012AP2557-CR State v. Bokenyi

This case examines whether a prosecutor breached a plea agreement by allegedly undermining the agreed-upon sentencing recommendation at the sentencing hearing, and whether defense counsel was ineffective for failing to object to the alleged breach.

In reviewing this case, the Supreme Court is expected to consider the Court of Appeals' decision in State v. Sprang, 2004 WI App 121, 274 Wis. 2d 784, 683 N.W.2d 522. That decision held that when defense counsel does not consult with the defendant when foregoing an objection to a breach of the plea agreement, counsel performs deficiently because that is "tantamount to entering a renegotiated plea agreement without [the defendant's] knowledge or consent."

Some background: William F. Bokenyi was charged with ten crimes arising out of an incident that occurred at his apartment during which he repeatedly threatened to kill his wife and their son. When officers arrived at the scene, the defendant was holding two knives and refused to drop them.

Pursuant to a plea agreement, the defendant pled guilty to first-degree recklessly endangering safety, felony intimidation of a victim, and failure to comply with an officer's attempt to take him into custody.

The remaining charges were dismissed and read in for sentencing purposes. The state agreed to cap its sentencing recommendation "at the high end range" of the pre-sentence investigation (PSI) report, which recommended three or four years of initial confinement followed by three or four years of extended supervision on the first-degree recklessly endangering safety charge. The PSI recommended that the trial court withhold sentence on the other two counts and put the Bokenyi on probation.

Before ultimately recommending the agreed upon sentence at the sentencing hearing, the prosecutor read a letter from the victim, indicating she would fear for her and her child's safety whenever Bokenyi would be released. The prosecutor also recounted a conversation Bokenyi allegedly had with a jailer in which he said he wanted to "shoot up some cops," and anyone else who got in the way.

The circuit court sentenced the defendant to concurrent terms of imprisonment on each of the three convictions. The court imposed seven years and five months of initial confinement and five years of extended supervision on the first-degree recklessly endangering safety count. It also sentenced the defendant to five years of initial confinement and five years of extended supervision on the intimidation of a victim count and one year of initial confinement and one year of extended supervision on the failing to comply with an officer count.

The defendant moved for resentencing, arguing that the prosecutor's remarks at sentencing had breached the plea agreement and that trial counsel was deficient in failing to object.

The defendant appealed, as noted above, the Court of Appeals reversed and remanded with directions for resentencing.

Having concluded that the state materially and substantially breached the plea agreement, the Court of Appeals went on to hold that trial counsel performed deficiently in failing to object to the breaches. It pointed out an attorney's failure to object to a material and substantial breach of the plea agreement constitutes deficient performance unless the attorney did so for a valid strategic reason and consulted with the defendant about the decision not to object. See Sprang.

The state asks the Supreme Court to overrule Sprang. The state says it believes Sprang erroneously equates the failure to object to a prosecutor's breach of a plea agreement with a renegotiation of the agreement and from that mistaken premise, Sprang imposes a duty of consultation on defense counsel that is legally unwarranted and difficult to implement and which makes it possible for a defendant to prevail on a claim of ineffective assistance of counsel, regardless of whether counsel had a valid strategic reason for not objecting.

The defendant says the factual distinction between Sprang and this case is that here counsel had no strategic reason for not objecting.

WISCONSIN SUPREME COURT
TUESDAY, MARCH 18, 2014
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which reversed a Wood County Circuit Court decision, Judge Jon M. Counsell, presiding.

2012AP1967 Data Key Partners v. Permira Advisors

In this dispute between shareholders over the sale of a business, the Supreme Court examines, among other things, the business judgment rule, which is codified in Wis. Stat. § 180.0828.

The business judgment rule protects directors from liability for a fault in the business-decision-making process or in the decision itself, so long as the directors made the decision in the honest belief that it was in the best interest of the company.

Some background: Renaissance Learning Inc. was a publically traded Wisconsin corporation before being sold to Permira Advisors LLC and affiliated entities. Renaissance had approximately 29 million shares of common stock outstanding, held by approximately 269 stockholders and by more than 2,000 beneficial owners.

Terrance and Judith Paul co-founded Renaissance, owned a majority of the company's shares, and sat on the corporation's board of directors. The Pauls decided to "cash out" their ownership in Renaissance as part of their retirement plans. Given the large number of shares that the Pauls held, they were unable to sell their shares on the open market. Also, the Pauls believed they could maximize the share price by selling the entire company. The Pauls' personal banker, Goldman Sachs, was selected to act as financial advisor for the sale of Renaissance.

Renaissance and Permira entered into an "Agreement and Plan of Merger" under which Permira would merge with or purchase Renaissance for $14.85 per share. A different company, Plato Learning, Inc., then offered to purchase Renaissance for $15.50 per share.

The Renaissance board of directors rejected the Plato offer and instead entered into an amended agreement with Permira under which Permira would pay $15 per share to the Pauls and $16.60 per share to minority shareholders, in part because the Pauls thought that a deal with Permira had a high likelihood of closing; failure to close a deal with Permira would result in a $13 million termination fee; and Permira had agreed to grant a license benefitting a separate company controlled by the Pauls.

Plato made a revised offer consisting of $15.10 per share for the Pauls and $18 per share for minority shareholders, equaling an aggregate purchase price of approximately $471 million. The Pauls informed the other board members that they would not support acceptance of this revised Plato offer.

Plato made a third offer for a total of approximately $496 million that was rejected by Renaissance leadership. Ultimately, Renaissance was sold to Permira, consistent with the amended agreement between Renaissance and Permira.

Data Key Partners was a minority shareholder in Renaissance. Data Key sued the Pauls, the other Renaissance directors, and Permira. Data Key alleged that it represented the minority shareholders as a class. Data Key brought four claims, each of which was dismissed by the trial court following the Permira's motion to dismiss.

Data Key appealed. The Court of Appeals affirmed the trial court's dismissal of two of Data Key's four claims. The Court of Appeals reversed and reinstated the other two of Data Key's claims, which remain subject of this appeal: their claim against the Renaissance directors for breach of fiduciary duty, and their claim against the Pauls for breach of fiduciary duty in their capacity as majority shareholders.

The Court of Appeals ruled that it is inappropriate to apply the business judgment rule at the motion to dismiss stage because application of the rule generally requires a fact-intensive analysis that is incompatible with notice pleading.

The Court of Appeals also reversed that part of the trial court's decision that dismissed Data Key's claim for breach of fiduciary duty against the Pauls as majority shareholders.

The Supreme Court now reviews, among other things, whether the trial court erred in applying the business judgment rule against Data Key at the motion to dismiss stage of the proceedings.

WISCONSIN SUPREME COURT
TUESDAY, MARCH 18, 2014
1:30 p.m.

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which affirmed an Eau Claire County Circuit Court decision, Judge William M. Gabler, Sr., presiding.

2012AP2140 State v. Nelson

This sexual assault case examines whether Wisconsin case law provides that a criminal defendant is automatically entitled to a new trial if the circuit court prohibits the defendant from testifying in her own defense.

Some background: Angelica C. Nelson was 18 years old when she had sexual intercourse with a 14-year-old boy at school. The boy's mother testified that after friends told her about a rumor that Nelson had sex with her son, she asked Nelson in a text message whether the rumor was true. Nelson responded: "You're going to be mad at me; but, yes, I did." Nelson also indicated in a text to the victim's mother that it happened three times behind the school. When D.M.'s mother told Nelson it was inappropriate, Nelson responded: "I know there's laws, but he's hot and I'm sorry." The victim's mother reported the incident to police.

Nelson admitted to police that she had sex with the boy three times and that she knew the boy was 14 years old. Nelson was charged and the case went to trial.

After the state rested its case, Nelson stated on the record at least three times that she wanted to testify on her own behalf. The circuit court asked for the substance of Nelson's proffered testimony. Nelson indicated she would not deny that she had sexual intercourse with the boy or that he was younger than sixteen years old—she merely wanted her "side to be heard."

The court ultimately prohibited Nelson from testifying. The court noted that it would be against counsel's advice and was "completely irrelevant" to the elements the state had to prove. The trial court concluded Nelson had not validly waived her privilege against self-incrimination and refused to allow her to take the stand.

The jury found Nelson guilty. The trial court withheld sentence and imposed five years' probation. Nelson's post-conviction motion for a new trial was denied. She appealed, and the Court of Appeals affirmed.

The state contends that even if the trial court violated Nelson's right to testify, that error is subject to a harmless-error analysis citing State v. Flynn, 190 Wis. 2d 31, 56, 527 N.W.2d 343 (Ct. App. 1994).

The Court of Appeals agreed with the state's argument that any error was harmless in light of the overwhelming evidence of Nelson's guilt. The Court of Appeals concluded, in part, that "a conviction will be upheld even in the face of a violation of a defendant's constitutional rights if, under the circumstances of the case, it can be shown beyond a reasonable doubt that a 'trial error' as opposed to a 'structural defect in the constitution of the trial mechanism,' did not contribute to the guilty verdict."

Nelson contends Flynn, a Court of Appeals' case, is distinguishable because Flynn claimed ineffective assistance of trial counsel deprived him of the right to testify, while Nelson claims the trial court deprived her of the right to testify.

A decision by the Supreme Court could clarify whether a harmless-error analysis applies to a circuit court's denial of a defendant's right to testify.

WISCONSIN SUPREME COURT
WEDNESDAY, MARCH 19, 2014
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which reversed a Jefferson County Circuit Court decision, Judge Randy R. Koschnick, presiding.

2012AP2185-CR State v. Hunt

This case examines whether a trial court erred in preventing a witness from testifying that he did not send the defendant a sexually explicit video clip that resulted in the defendant being convicted of causing a child younger than 13 to view sexually explicit conduct on his cell phone. The Supreme Court also considers if the trial court erred, whether the error harmless.

Some background: James R. Hunt was convicted of causing an 11-year-old girl to view sexually explicit conduct. The girl testified at trial that when she was 11 years old, the defendant had shown her three images on his cell phone: a video of a man and woman having sexual intercourse and two other images that the trial court concluded at the preliminary hearing were not sexually explicit.

The girl also testified that, when she was younger, Smith had put her hand on his penis. Smith testified at trial that he never showed the girl a video of a couple having intercourse, and that he never put her hand on his penis. He testified that the screensaver on his cell phone was a picture of a topless woman holding a deer rack and that the girl had seen that image. He also testified that, on the day the girl described as the day he had shown her a video of intercourse on his phone, he had received a text message with a picture of a herniated testicle from his friend Matthew Venske. The defendant testified the girl was standing next to him when he opened that image, and that she saw it.

Venske testified for the defense. He said he sent text messages to the defendant, including pictures. Venske testified he had sent the defendant a picture of a topless woman holding a deer head and had sent a picture of a herniated testicle. Defense counsel asked Venske if he had sent the defendant a video of sexual intercourse. The trial court disallowed the question. Outside the presence of the jury, the defense asserted Venske would testify he never sent a video of sexual intercourse to the defendant. The trial court found the source of the video was irrelevant.

The jury found the defendant not guilty of sexual assault but guilty of exposing a child under the age of 13 to sexually explicit conduct. In a post-conviction motion, the defendant argued he was denied his right to present a defense when the court excluded proffered testimony by Venske that he had not sent the defendant a video of a couple engaging in sexual intercourse. The motion also alleged that the defendant had been denied the effective assistance of counsel. The circuit court denied the motion. The Court of Appeals reversed and remanded.

The Court of Appeals said it was undisputed that the excluded testimony of Venske was relevant to the defense. It said the theory of defense was that the girl saw a text message from Venske, which was a picture of a herniated testicle, and that the girl embellished that event by saying the defendant also showed her a video of sexual intercourse. The Court of Appeals said Venske corroborated the defendant's testimony about the herniated testicle image but was prevented from testifying he never sent the defendant a video of sexual intercourse. The court

reasoned the excluded testimony would have further corroborated the defendant's version of events.

The Court of Appeals went on to conclude that the circuit court's error in excluding Venske's testimony that he did not send the defendant a video of sexual intercourse was not harmless. The court said the case clearly turned on the relative credibility of the girl and Hunt, and the jury had to decide which one of them was telling the truth. The Court of Appeals noted the state did not dispute that the circuit court erred in excluding Venske's testimony, but the state claimed the error was harmless because an investigating police officer testified that Venske had denied to them that he had sent the defendant a video of sexual intercourse.

The state argues that there are legitimate concerns about the correctness of the Court of Appeals' decision, which resulted in the reversal of a serious felony conviction.

WISCONSIN SUPREME COURT
WEDNESDAY, MARCH 19, 2014
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which reversed in part a Barron County Circuit Court decision, Judge James D. Babbitt, presiding.

2013AP221 Dow Family v. PHH Mortgage Corp.

This foreclosure case examines the doctrine of equitable assignment and whether a mortgage automatically transfers upon the transfer of the associated note, without the need for a written mortgage assignment. A decision by the Supreme Court could affect borrowers, lenders and other businesses statewide, including those who have relied on the services of the privately run Mortgage Electronic Registration Systems, Inc., (MERS).

As described by the Court of Appeals, MERS is an electronic registration system for mortgages that does not originate, lend, service, or invest in home mortgage loans. Instead, MERS acts as the nominal mortgagee for the loans owned by its members, which include lenders, financial institutions, and servicers who pay a membership fee to MERS. The mortgage itself is recorded, but subsequent assignments of the mortgage between MERS members typically are not. Instead, MERS tracks the assignments.

In this case, Dow Family LLC bought a condominium unit in Barron County from prior property owners, William and Jo Sullivan. The Sullivans had issued a note to "U.S. Bank, National Association," on May 17, 2001 in the sum of $146,250. The note, recorded June 22, 2001, was secured by a mortgage on the condominium and listed MERS as the mortgagee.

In preparation for the sale of the condominium to Dow, Dow's attorney obtained a title commitment which showed two mortgages to U.S. Bank: the 2001 mortgage, and a 2003 mortgage in the sum of $140,000.

Dow's attorney e-mailed the Sullivans' attorney to ask about the mortgages. In response, the Sullivans' attorney stated that "the US Bank mortgage originated in 2001 (original amount $146,250) [and] should no longer be on the title and is the same mortgage listed . . . from 2003 (original amount $140,000)."

The sale to the Dow Family closed on May 20, 2009, without paying off the first mortgage on title. The closing statement shows that a single mortgage to U.S. Bank in the amount of $143,140.89 was satisfied at closing.

On Nov. 24, 2009, in-house counsel for PHH Mortgage Corporation, wrote to Dow's attorney asserting that the 2001 mortgage "remain[ed] of record because the Note was not paid in full." PHH's attorney stated the loan was delinquent, and PHH would initiate foreclosure proceedings if Dow did not take steps to resolve the matter.

Dow filed a lawsuit against PHH seeking a declaratory judgment that the 2001 mortgage no longer constituted a lien on the property. PHH filed a separate lawsuit seeking a foreclosure judgment. The two lawsuits were consolidated.

PHH's complaint alleged it was "the current holder of a certain note and recorded mortgage on real estate located in this county," and that true copies of the note and mortgage were attached to the complaint. The attached copy of the note listed U.S. Bank as the lender and William and Jo Sullivan as the borrowers. It did not contain any endorsements. PHH later

produced a copy of the note with two undated endorsements: an endorsement from U.S. Bank to "Cendant Mortgage Corporation d/b/a PHH Mortgage Services Corporation," and an endorsement in blank by Cendant.

The copy of the mortgage attached to PHH's complaint listed MERS as the mortgagee and the Sullivans as the borrowers. No assignment of mortgage was attached to the complaint. The complaint did not allege the existence of any assignment.

PHH successfully moved for summary judgment, and the court entered a foreclosure judgment in favor of PHH.

Dow appealed, with partial success. The Court of Appeals held that there were simply too many questions surrounding the note that PHH submitted on summary judgment for the court to conclude it was a true and correct copy of an original note in PHH's possession. However, the Court of Appeals agreed with PHH that the doctrine of equitable assignment applied in this case, and, consequently, that PHH did not need to prove a written assignment of mortgage.

Dow contends that the doctrine of equitable assignment cannot apply to real estate mortgages because the statute of frauds requires that every assignment of a real estate mortgage be in writing, signed, and delivered. *See* Wis. Stat. § 706.02(1).

Dow claims that at the time Dow purchased the property, the mortgage was held by MERS, but the note was held by a different entity, perhaps PHH. Dow contends that because the note and mortgage were held by separate entities, there was no enforceable mortgage.

PHH says this case presents an application of the common law doctrine of equitable assignment that has been around for 100 years and is codified in Wis. Stat. § 409.203(7).

WISCONSIN SUPREME COURT
WEDNESDAY, MARCH 19, 2014
1:30 p.m.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which affirmed a Portage County Circuit Court decision, Judge Thomas T. Flugaur, presiding.

2011AP1653-CR State v. Cummings

This case examines whether a defendant invoked his right to silence under Miranda v. Arizona, 384 U.S. 436 (1966) when, during the course of an interrogation, he told the police officer, "Well, then, take me to my cell." The defendant, Carlos A. Cummings, also contends his punishment of the maximum penalty for first-degree reckless injury as party to a crime was unduly harsh and that his trial counsel was ineffective.

Some background: Cummings was originally charged with being party to the crime of attempted first-degree intentional homicide. The criminal complaint alleged that he plotted with his lover to hire a cognitively impaired woman with an IQ in the 60s to shoot his lover's husband, drove the woman to a location where she shot the man in the head five times, then drove the woman away from the scene and hid the gun and bullets in his basement.

The complaint included statements the defendant made to police while in custody.

The entire exchange during which the defendant claimed to have invoked his right to silence was as follows:

Officer: . . . *This is your opportunity to be honest with me, to cut through all the bullshit and be honest about what you know.*

Cummings: *I'm telling you.*

Officer: *So why then do we got [the victim's wife] and [the shooter] telling us different?*

Cummings: *What are they telling you?*

Officer: *I'm not telling ya! I'm not gonna fuckin' lay all my cards out in front of you Carlos and say, "This is everything I know!"*

Cummings: *Well, then, take me to my cell. Why waste your time? Ya know?*

Officer: *Cuz I'm hoping. . .*

Cummings: *If you got enough. . .*

Officer: . . .*to get the truth from ya.*

Cummings: *If you got enough to fucking charge me, well then, do it and I will say what I have to say, to whomever, when I plead innocent. And if they believe me, I get to go home, and if they don't. . .*

Officer: *If who believes you?*

Cummings: . . .*and if they don't, I get locked up.*

Officer: *And you're okay with that?*

Cummings: *No! I'm not okay with that! I don't want to be in that predicament, but right now, I'm under arrest. That's how I see it.*

Cummings filed a suppression motion arguing that police had violated his Fifth Amendment rights by continuing his interrogation after he had invoked his right to silence. The circuit court ruled that most of the statements would be admissible. The defendant then entered a plea to a reduced charge of being party to the crime of first-degree reckless injury. Two counts of aiding a felon were read in.

At sentencing, the circuit court said it viewed the defendant as "the mastermind" of the murder plot, and it imposed a near maximum sentence of 14 years of initial confinement and 10 years of extended supervision. A post-conviction motion was denied, and the Court of Appeals affirmed.

The Court of Appeals agreed with the circuit court that the defendant's request to be taken to his cell was not an unequivocal invocation of his right to remain silent. The Court of Appeals said

Cummings' statement was ambiguous and a more compelling interpretation is that he was merely attempting to obtain more information from the police about what his co-conspirators had been saying.

The Court of Appeals said if the statement is ambiguous it does not constitute an unequivocal invocation requiring police to immediately stop questioning the suspect.

Cummings contends the sentence was unduly harsh because the trial court failed to give adequate consideration to the defendant's alcohol or drug issues, mental health problems, and horrible childhood, and because the court refused to impose a risk reduction sentence. He also complained that his role in the offense did not justify a term of initial confinement that was twice as long as that given to the shooter. The Court of Appeals found none of those arguments persuasive.

The Court of Appeals said the record indicates that the circuit court did explicitly acknowledge the defendant's difficult childhood, attention disorder, and AODA issues, but the court also found the defendant was articulate and seemed to be capable of contributing to society if he were to put his abilities to good use rather than continuing to commit criminal offenses.

WISCONSIN SUPREME COURT
WEDNESDAY, MARCH 19, 2014
1:30 p.m.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which affirmed a Milwaukee County Circuit Court decision, Judge Thomas P. Donegan, presiding.

2012AP520-CR State v. Smith

This case examines whether police violated a suspect's right to remain silent under Miranda v. Arizona, 384 U.S. 436 (1966), during a custodial interrogation.

The Supreme Court reviews a Court of Appeals opinion affirming a circuit court ruling that police did not violate Adrean L. Smith's Miranda rights when police continued to question him after he said: "I don't know nothing about this stuff, so I don't want to talk about this."

Some background: Smith was charged with 18 felonies arising out of a series of armed robberies. While a detective was investigating the robberies, the detective conducted a custodial interrogation of the defendant. The detective advised the defendant of his Miranda rights, and the defendant waived them. As part of the interrogation, the detective asked the defendant about a stolen van, which prompted Smith's comment. The detective continued the interview and Smith later gave incriminating statements, admitting to his involvement in a series of robberies, burglaries, and shootings.

Here's the relevant exchange:

> Mr. Smith: *See, I don't want to talk about, I don't want to talk about this. I don't know nothing about this.*
>
> Detective: *Okay.*
>
> Mr. Smith: *I don't know nothing. See, look, I'm talking about this van. I don't know nothing about no van. What's the other thing? What was the other thing that this is about?*
>
> Detective: *Okay.*
>
> Mr. Smith*: I don't even want to talk about – I don't know nothing about this, see. I'm talking about this van. This stolen van. I don't know nothing about this stuff. So, I don't want to talk about this.*
>
> Detective: *I've got a right to ask you about it.*

Smith unsuccessfully moved to suppress the statements he had made during the custodial interrogation, saying his statement amounted to an unambiguous assertion of his right to remain silent. Following denial of the suppression motion, Smith pled guilty to four charges. The remaining charges were read-in for sentencing purposes, and he was sentenced to 25 years of initial confinement and 10 years of extended supervision.

The Court of Appeals noted that a suspect must unequivocally invoke his right to remain silent before police are required to stop an interview or clarify equivocal remarks the suspect might have made. It noted police may continue an interrogation if a defendant validly waives his

right to remain silent and later initiates further conversation. It pointed out that that after the defendant told the detective he did not "want to talk about this," he nonetheless kept talking.

The Court of Appeals reasoned the defendant's continued conversation indicated not that the defendant wanted to stop talking about everything but that he did not want to discuss a stolen van about which he claimed to have no information. The Court of Appeals noted that refusals to answer specific questions do not amount to an assertion of an overall right to remain silent:

> *"A suspect must unequivocally invoke his or her right to remain silent before police are required either to stop an interview or to clarify equivocal remarks by the suspect." [State v. Markwardt], 2007 WI App 242, ¶26, 306 Wis. 2d at 434-435, 742 N.W.2d at 554. That is, a suspect "must articulate his or her desire to remain silent or cut off questioning 'sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be an invocation of the right to remain silent." State v. Ross, 203 Wis. 2d 66, 78, 522 N.W.2d 428, 533 (Ct. App. 1996).*

Smith maintains that he did in fact make an unequivocal invocation of right to remain silent and that the detective violated that right by continuing to question him.